

DEPARTMENT OF STATE REVENUE

LETTERS OF FINDINGS NUMBER:

95-0730, 96-0337, 96-0338

**Taxability of Electrical Energy Consumed in Food Production
For The Periods 1992 through 1994**

NOTICE: Under Ind. Code § 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Sales/Use Tax Exemption for Utilities Consumed in Food Production: microwave ovens.

Authority: Ind. Code § 6-2.5-4-5;
Ind. Code § 6-2.5-5-1.1;
Indiana Department of Revenue Sales Tax Information Bulletin #55 (May 31, 1989).

The taxpayer protests the partial denial of a sales tax exemption for utilities consumed by microwave ovens used in its restaurants.

II. Sales/Use Tax Exemptions for Utilities Consumed in Food Production: coolers and freezers.

Authority: Ind. Code § 6-2.5-4-5;
Ind. Code § 6-2.5-5-1.1;
Indiana Department of Revenue Sales Tax Information Bulletin #55 (May 31, 1989).

The taxpayer protests the denial of a sales tax exemption for utilities consumed by coolers and freezers used in its restaurants.

III. Assessment of Taxes: accuracy of the audit report.

Authority: Ind. Code § 6-8.1-5-1

The taxpayer protests the accuracy of the auditor's report.

STATEMENT OF FACTS

The taxpayer is an Indiana corporation that owns and operates three (3) restaurants in Indiana. Sales and use tax audits were completed on two of the restaurants on August 11, 1995, and on the third on September 7, 1995. The audits covered the tax years 1992 through 1994. As a result of the audits, the taxpayer was assessed use tax on a percentage of gas and electric utilities consumed at the restaurants.

The taxpayer protests the assessment of use tax on utilities consumed to operate various pieces of equipment in the taxpayer's restaurants. Specifically, the taxpayer protests the partial use tax exemption for energy consumed by its microwave ovens. According to the taxpayer, the restaurants' microwaves are used solely for food production purposes and should be granted full exemption from use tax. Furthermore, the taxpayer believes that the restaurants' coolers and freezers, used to maintain freshness and temperature consistency of the food, are an integral part of the production process, and therefore, the energy consumed by them should be exempt from use tax. The taxpayer also protests the accuracy of the audit report in general.

I. Sales/Use Tax Exemption for Utilities Consumed in Food Production: microwave ovens.

DISCUSSION

The taxpayer maintains that the microwave ovens in its three restaurants are used exclusively for food production and, therefore, should be 100 % exempt from use tax. The taxpayer does not offer any evidence supporting its position.

Furnishing or selling electrical energy for commercial or domestic consumption constitutes making a retail transaction. Ind. Code § 6-2.5-4-5(b). Therefore, normal energy consumption requires the energy seller to collect and remit sales tax at the time the energy is sold. However, if, in the course of business, the electrical energy is directly consumed in the direct production of tangible personal property, the electrical energy is exempt from state gross retail tax. Ind. Code § 6-2.5-5-1.

Indiana Department of Revenue Sales Tax Information Bulletin #55 (May 31, 1989) states, "Restaurant food heating or cooling is taxable unless it is used in the actual production and creation of food." Experience gained from auditing restaurants suggests that microwave ovens are used partially for thawing or heating and partially for cooking, i.e. creation of food. Electrical energy consumed by the microwave ovens is, therefore, not completely exempt from use tax. Upon inspection, the auditor found that the electric energy consumed by the microwave ovens in one of the taxpayer's restaurants was 47.2 % exempt from use tax. The microwave ovens in the each of the other two restaurants owned by the taxpayer qualified for a 33.3 % exemption. These assessments are estimates based on the personal observation of the auditor and are in line with industry standards.

FINDING

Taxpayer's protest is denied.

II. Sales/Use Tax Exemption for Utilities Consumed in Food Production: coolers and freezers.

DISCUSSION

The taxpayer maintains that its coolers and freezers are used as an integral part of the process of production of food in its restaurants. The taxpayer believes that the electrical energy consumed by its coolers and freezers should be exempt from use tax. The taxpayer does not offer any evidence supporting its position.

Furnishing or selling electrical energy for commercial or domestic consumption constitutes making a retail transaction. Ind. Code § 6-2.5-4-5(b). Therefore, normal energy consumption requires the energy seller to collect and remit sales tax at the time the energy is sold. However, if, in the course of business, the electrical energy is directly consumed in the direct production of tangible personal property, the electrical energy is exempt from state gross retail tax. Ind. Code § 6-2.5-5-5.1.

The Indiana Department of Revenue Sales Tax Information Bulletin #55 (May 31, 1989) is instructive:

Restaurant food heating or cooling is taxable unless it is used in the actual production and creation of food. Utilities used for warming tables and refrigeration areas are taxable unless the food is undergoing a change due to this process. Refrigeration for storage is a taxable use of the utilities. . . . Utilities serving a refrigerator . . . used to keep the products or the raw materials in the same condition are taxable.

The audit report was based on the auditor's personal observation of how the taxpayer's coolers and freezers were being used. The auditor observed that the coolers and freezers were being used to store food, not to produce or create food. The electrical energy consumed by the taxpayer's coolers and freezers is, therefore, subject to use tax.

FINDING

The taxpayer's protest is denied.

III. Assessment of Taxes: accuracy of the audit report.

DISCUSSION

The taxpayer protests the accuracy of the auditor's report, specifically the figures used in the utility study performed at the taxpayer's Huntington, Indiana restaurant. "The notice of proposed assessment is *prima facie* evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." Ind. Code § 6-8.1-5-1(b). The taxpayer has submitted evidence supporting its claim in the form of copies of utility bills for 1992. According to those bills, the total kilowatt hours of electrical energy consumed by the Huntington restaurant was 289,840. The auditor's utility study used a figure of 296,630 total kilowatt hours of electrical energy consumed. Although using the taxpayer's figures for electrical energy consumed will result in only a slight difference in the tax assessment, the taxpayer is correct that an error was made in the calculation of energy consumed in the utility study for its Huntington restaurant.

FINDING

The taxpayer's protest is sustained with regard to the accuracy of the utility study for the taxpayer's Huntington restaurant.